

LATHAM & WATKINS LLP

October 16, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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**Re: Notice of Ex Parte Presentation, *Universal Service Contribution Methodology*,
WC Docket No. 06-122; Federal-State Joint Board on Universal Service,
CC Docket No. 96-45**

Dear Ms. Dortch:

On October 15, 2008, on behalf of USA Mobility, Inc., Vince Kelly, Chief Executive Officer, Tom Schilling, Chief Operating Officer, and Tom Saine, Chief Information Officer, together with Catherine Henderson and the undersigned, of Latham & Watkins LLP, met with the following Commission personnel regarding potential changes to the universal service fund (“USF”) contribution methodology: Nick Alexander, Legal Adviser to Commissioner Robert McDowell; and Scott Bergmann, Senior Legal Adviser to Commissioner Jonathan Adelstein. On October 16, 2008, we met with Amy Bender, Legal Adviser to Chairman Kevin Martin; Scott Deutchman, Legal Adviser to Commissioner Michael Copps; and James Eisner, Greg Guice, Jim Lande, Jeremy Marcus, Alexander Minard, Erica Myers, Carol Pomponio, Cindy Spiers, and Rodger Woock of the Wireline Competition Bureau. Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter, along with the materials distributed at the meetings, are being filed via ECFS.

The purpose of these meetings was to emphasize the critical importance of maintaining a revenue-based contribution methodology for paging carriers and their customers (or a flat-rate approach that maintains the very low contributions to which paging carriers are subject today). We explained that the proposal advanced by AT&T and Verizon, unless a carve-out is established, likely would destroy what remains of the paging industry, because a monthly USF fee of \$1.07 per assigned number would lead to a more than *tenfold* increase in the USF fee paid by many of USA Mobility’s customers. Indeed, in some cases, the new USF charge would amount to more than 25 percent of the customer’s entire bill—up from less than two percent today. USA Mobility accordingly proposed that the Commission retain the revenue-based USF fee for paging services, or alternatively establish a deeply discounted flat USF charge based on the paging industry’s unique circumstances.

We further explained that paging services are fundamentally different from wireless voice services. While the mobile phone industry has undergone explosive growth in recent

years, and now has more than 250 million units in service, the paging industry has declined dramatically, falling from approximately 45 million to fewer than 5 million units in service since 2000. Paging revenues also contrast starkly with other wireless carriers' revenues: Whereas national wireless voice carriers generate nearly \$50 per subscriber each month, USA Mobility generates less than \$8 per month for most subscribers (and in many cases less than half that amount). In addition, paging carriers face significant spectrum constraints compared to wireless voice carriers and make minimal use of the PSTN (because they rely on satellite transmission instead of wireline facilities for backhaul). And, despite paging carriers' obligation to contribute to the USF, they are not eligible to receive high-cost or low-income universal service support.

As a result of such factors, the Commission has consistently recognized that the paging industry warrants distinct treatment, including in the universal service context. For example, the Commission has always maintained a separate safe harbor for calculating paging carriers' and wireless voice carriers' interstate revenue percentage, and it declined to increase the paging safe harbor (from 12 percent) when it raised the general wireless safe harbor from 15 percent to 28.5 percent in 2002,¹ and to 37.1 percent in 2006.² The Commission likewise has exempted paging carriers from regulatory fee increases every year since 2003, observing that the long-lasting decline in subscribership and the spectrum-limited, geographically localized, and cost-sensitive nature of the paging industry make it impossible to pass through significant cost increases to subscribers and warrant "some measure of relief."³ The Commission also has exempted paging carriers from many voice-centric regulations, including 911/E911, local number portability, and number pooling requirements.⁴

Here, too, the Commission should maintain an alternative approach to USF contributions for paging services that recognizes the unique posture of the paging industry and avoids imposing needless hardships on paging carriers and their subscribers. The Commission should continue to assess contributions based on paging carriers' interstate revenues (as determined by interstate minutes of use), consistent with AT&T/Verizon's proposed carve-out for prepaid wireless voice services. Alternatively, the Commission could derive a flat monthly charge by comparing paging carriers' interstate revenues to the proposed \$1.07 monthly fee. Data submitted by AAPC suggests that an appropriate flat monthly USF charge for paging services would be approximately \$0.05 per month.⁵

¹ See *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24965-66 (2002).

² See *Federal-State Joint Board on Universal Service*, Report and Order and Notice of Proposed Rule Making, 21 FCC Rcd 7518, 7531-34 (2006).

³ *Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, Report and Order, 18 FCC Rcd 15985, 15992 (2003).

⁴ See 47 C.F.R. § 20.18(a); *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7634 (2000).

⁵ See Letter of Kenneth E. Hardman, counsel for American Association of Paging Carriers (AAPC), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, CC Docket No. 96-45, at 3-4 & n.1 (Oct. 9, 2008) (estimating average paging revenues to be approximately \$8.00 per subscriber per month and noting

These alternative mechanisms would have a de minimis impact on the contribution methodology overall: They would add less than a penny to the monthly per-number charge, even using the inflated estimate of assessable numbers provided by AT&T/Verizon.⁶ This impact would amount to less than that of excluding telephone numbers of Lifeline subscribers, less than one-quarter of that of assessing prepaid wireless services based on minutes of use, and less than one-seventh of that of assessing “family share” numbers at 50 percent of the per-telephone number charge.⁷

In addition, failure to adopt an alternative contribution mechanism for paging services would undermine the public interest. Pagers remain a critical technology for many important customer segments, including hospitals and health care professionals as well as police departments, fire departments, and other emergency responders. Paging services remain vital for emergency communications because of their exceptional reliability and affordability. Because paging networks rely on satellite transmission and have built-in redundancy due to simulcasting, for example, they are far less vulnerable to service outages. Moreover, paging transmitters emit more powerful signals than mobile voice transmitters, significantly improving range and in-building penetration. And most paging devices use AA or AAA batteries, thus avoiding the need for constant re-charging and ensuring continuing functionality during sustained power outages. For these and other reasons, the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks lauded the exemplary performance of paging systems and recommended a number of actions designed to broaden their use during emergencies.⁸ The Commission, in turn, adopted the Katrina Panel’s findings and expressly endorsed the goal of promoting more widespread use of paging services by emergency responders.⁹ Adopting the AT&T/Verizon proposal without an alternative contribution mechanism for paging carriers would undermine these acknowledged public interest benefits, even though the need for reliable and affordable emergency communications solutions remains as compelling as ever.

Finally, failure to adopt an alternative mechanism for paging services would violate the Communications Act and the Administrative Procedure Act (“APA”). Section 254(d) of the Act requires that the USF contribution methodology be “equitable and nondiscriminatory,”¹⁰ and an approach that massively increases contributions by paging subscribers—while reducing (or only modestly increasing) other customer segments’ contributions—would fly in the face of that mandate. Indeed, a flat monthly charge of \$1.00 or more would exceed USA Mobility’s

that the 12 percent safe harbor for calculating the percentage of interstate revenues significantly overstates interstate usage).

⁶ Letter of Mary L. Henze, AT&T Services, Inc. and Kathleen Grillo, Verizon, WC Docket No. 06-122, CC Docket No. 96-45, Direct USF Contribution Methodology: Supporting Data Analysis, Table 2 (Sept. 23, 2008).

⁷ *Id.*

⁸ Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Report and Recommendations to the FCC, at 10, 24, 32, 37-38, 40 (2006).

⁹ *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order, 22 FCC Rcd 10541, 10544-45 (2007).

¹⁰ 47 U.S.C. § 254(d).

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interstate revenues for the majority of its customers, and thus would replicate the very error that the U.S. Court of Appeals for the Fifth Circuit found applicable to a previous contribution scheme involving international revenues.¹¹ By contrast, allowing paging carriers to continue contributing based on their interstate revenues would fairly apportion contribution burdens among the various industry participants and customer segments.

For similar reasons, imposing a flat monthly USF charge in excess of \$1.00 on paging carriers and their customers would constitute arbitrary and capricious decisionmaking, in at least three different respects. First, treating paging carriers the same as wireless voice carriers in spite of the fundamental differences between the two classes of providers is plainly unreasonable.¹² Second, if the Commission accommodates the concerns of wireless carriers that provide prepaid services and family-share plans, it would be arbitrary and capricious to deny paging carriers comparable treatment, because the logic underlying those proposed carve-outs applies even more powerfully to paging services.¹³ Finally, in light of the Commission's past findings that (a) paging carriers cannot pass through significant fee assessments (which in the context of annual regulatory fees were far more modest than the USF charges at issue here), and (b) paging services deliver vital public interest benefits by enabling emergency communications and other important functions, it would be arbitrary and capricious to saddle paging carriers and customers with massively increased fees that would break the back of an already-beleaguered sector.¹⁴

Please contact the undersigned if you have any questions regarding this letter.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for USA Mobility, Inc.

Attachment

¹¹ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999) (holding that disproportionate impacts caused by assessing certain providers' international revenues violated Section 254(d)).

¹² See, e.g., *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (holding that an agency must "justify its failure to take account of circumstances that appear to warrant different treatment for different parties").

¹³ See, e.g., *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.").

¹⁴ See, e.g., *Ctr. for Auto Safety v. FHA*, 956 F.2d 309, 313 (D.C. Cir. 1992).

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